In The
Supreme Court of the United States

NATIONAL ADVERTISING CO.,
a Delaware corporation,

Petitioner,

v.

CITY OF MIAMI,
a Florida municipal corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where municipal zoning officials have rejected applications for permits to build outdoor signs and the applicable sign code expressly prohibits both the signs and a variance, is it necessary for the applicant to take the futile step of appealing the rejection or seeking a variance before making a facial First Amendment challenge to the sign code?

2. Must an applicant for an outdoor sign permit exhaust administrative remedies before bringing an action under 42 U.S.C. § 1983 alleging that a municipal sign code facially abridges the First Amendment?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption. National Advertising Co. is wholly owned by Viacom Outdoor, Inc. which is wholly owned by Viacom, Inc. Therefore, there is no parent or publicly held company owning 10% or more of National Advertising Co.'s stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

This petition seeks review of a decision of the Eleventh Circuit Court of Appeals holding that National Advertising Co.'s attack on the City of Miami's Sign Code was not ripe, even though City zoning officials denied National's applications for six sign permits outright and despite the fact that the Sign Code expressly prohibits the signs that National sought to erect. The Eleventh Circuit's ruling is flatly inconsistent with this Court's prior holdings that where a zoning ordinance leaves no discretion for the zoning authority to permit the use sought by the landowner, the landowner need not submit repeated applications for inevitable denial before challenging the applicable ordinance. Moreover, in the First Amendment context, the very existence of an overly broad ordinance may chill protected speech. In keeping with this principle, this Court has repeatedly held that the ripeness doctrine is somewhat relaxed in the First Amendment arena and that the exhaustion of administrative remedies is not a prerequisite to actions under 42 U.S.C. § 1983. The Eleventh Circuit's decision, holding that National's First Amendment challenge to the City of Miami's Sign Code pursuant to 42 U.S.C. § 1983 is not fit for judicial review, ignores these fundamental principles and should be reversed.

This petition is submitted simultaneously with a petition seeking review of the Eleventh Circuit's decision in *National Advertising Co. v. City of Miami*, 402 F.3d 1329 (11th Cir. Mar. 21, 2005). In that decision, the Eleventh Circuit held that the City's amendment of its Sign Code mooted a facial overbreadth attack on the Sign Code despite the fact that the City was continuing to enforce the old ordinance by requiring National to remove signs that violated the old ordinance. In both actions, National

challenged the facial constitutionality of the City's Sign Code. In both actions, the Eleventh Circuit refused to review the merits of the challenges in derogation of decisions of this Court and of other federal courts of appeals.

CITATIONS OF THE OPINIONS AND ORDERS IN THE CASE

National Advertising Co. v. City of Miami, 288 F. Supp. 2d 1282 (S.D. Fla. Sept. 26, 2003) (App. 11), *aff'd*, 402 F.3d 1335 (11th Cir. Mar. 21, 2005) (App. 1).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued a decision in this case on March 21, 2005. (App. 1). National Advertising Co. filed a timely petition for rehearing or rehearing en banc on April 11, 2005. The Eleventh Circuit denied the petition on May 20, 2005. (App. 104). Justice Kennedy granted National through Monday, October 17, 2005, to file this petition. This Court has jurisdiction to review the judgment of the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amends. I & XIV (App. 106); portions of the City of Miami Zoning Ordinance 11,000, as amended (App. 107).

STATEMENT OF THE CASE

National is a wholly owned subsidiary of Viacom Outdoor, Inc., the largest outdoor advertising company in the United States, Canada and Mexico. (D2/9/1-3).[1] National operates more than forty (40) outdoor advertising signs in the City of Miami. (D2/9-5). The signs are available to local and national advertisers for commercial and noncommercial messages similar to newspaper and broadcast advertising. (D2/9/7). National itself displays noncommercial messages on its signs from time to time advocating a variety of causes such as "Stand Up for Public Schools," "Open Your Heart to the Homeless," and "Learn CPR. Help Save a Life." (D2/35/22-33 & Ex.18; D1/9/Ex.3/5).

In August and September, 2001, National located six pieces of privately-owned property in areas designated by the City's Zoning Ordinance as Commercial "C-1" Zones and executed leases with the owners of those locations to use the properties for the construction and operation of outdoor advertising signs. (D2/35/9-10 & Ex.2-7). National paid each of the property owners a fee of $500 to $1,000 to keep the properties available while National sought permits, and National agreed to pay additional rent after the signs were erected. (D2/35/12).

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[1] In the Eleventh Circuit Court of Appeals, appeals from district courts are taken on the original record without an appendix. *See* 11th Cir. R. 30-1. Here, the district court consolidated two cases below but entered separate final judgments in each case, and therefore citations to the record are to the district court dockets in both cases. References to No. 01-CV-3039 are by "(D1/__/__)." References to No. 02-CV-20556 are by "(D2/__/__)."

After obtaining the leases, National had engineering work and surveys conducted for site plans at a cost of $3,000 to $4,000 for each sign. (D2/35/13). Each of the signs could have been built within four to six weeks after issuance of a permit. (D2/35/11).

The City Denies National's Six Permit Applications

On December 20 and 26, 2001, National filed six applications with the City for permits to construct the six outdoor advertising signs. (D2/35/14 & Exs.9-14). Each application identified the land on which the sign would be built, the owner of the land, the size and height of the sign (65 feet high and 672 square feet in area), and that the sign would be used for advertising. (D2/9/12 & Exs.1-6). The proposed signs conformed with all state and federal laws governing the size, height, and spacing of signs (D2/35/20), but would have been in violation of the City Sign Code, which prohibits signs that advertise goods and services not available on the property where the sign was to be located.

On January 8, 2002, National's representatives appeared at the City's Building and Zoning Department and presented the six applications to inspectors of the City's electrical, public works, structure, and zoning departments for review and approval. (D2/35-14-15). Gaston Cajina, a Zoning Department reviewer, denied the applications. (D2/35/15). Cajina orally advised National's representatives that offsite outdoor advertising signs were not allowed in the C-1 zone where National sought to place the signs. He further stated that the signs were too tall to be built in other city zones that do allow offsite outdoor advertising. (D2/35/15 & D2/9/10-11). Miguel Gutierrez,

the City's Chief of Inspector Services, testified that Cajina's rejection of the permits was "tantamount to a denial because you are not going anywhere if you don't get the approval." (D2/35/67). He also acknowledged that the rejections included a notation "'do not issue permits as per administration.'" (D2/35/67).

According to the City's Building Official, José Ferras, and the City's zoning administrator, if a single reviewer rejected a permit application, no one within the Building Department would issue the permit, not even the Building Official. (D1/76/6; D2/45/Ex.14/33-34, 40, 49 & D2/45/Ex.9/50-51). Ferras testified that the Building Official had no authority to override a rejection by the Zoning Department. (D1/76/7; D2/45/Ex.14/33-35). He further testified that the Sign Code in place when National filed its applications "prohibited off site advertising within C-1 zones," and that had he been asked to approve the applications, he would not have because the Zoning Department had rejected them. (D2/61/44/48). Given the plain language of the ordinance prohibiting the signs at issue and the fact that City officials had made it clear that pursuit of administrative appeals, if any were available, would be futile, National did not appeal the denial of its permits. (D2/35/32).

The City's Sign Code Prohibited the Signs Which National Sought to Build

The Sign Code in effect at that time explicitly prohibited the granting of a variance for an outdoor advertising sign. Section 925, which contained the general requirements and limitations applicable to signs, expressly stated that "no variance from these provisions is permitted." (D1/94/Ex.1/368). The existence of this provision makes it